



ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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STATE OF OKLAHOMA

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CLERK

LAURA NEWBERRY and ELDON MERKLIN,)

Protestants/Petitioners,)

v.)

ANDREW MOORE, JANET ANN LARGENT and)
LYNDA JOHNSON,)

Respondents/Proponents.)

Sup. Ct. Case No. 118,406

Heizo

Clerk

RESPONDENTS/PROponents ANDREW MOORE, JANET ANN LARGENT
AND LYNDA JOHNSON'S SUR-REPLY BRIEF

D. KENT MEYERS, OBA #6168
ALISON M. HOWARD, OBA #19835
MELANIE WILSON RUGHANI, OBA #30421
CROWE & DUNLEVY
A Professional Corporation
Braniff Building
324 North Robinson Avenue, Suite 100
Oklahoma City, Oklahoma 73102
(405) 235-7700
(405) 239-6651 (Facsimile)
kent.meyers@crowedunlevy.com
alison.howard@crowedunlevy.com
melanie.rughani@crowedunlevy.com

January 8, 2020

ATTORNEYS FOR
RESPONDENTS/PROponents

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As explained in prior briefs, IP420 would change Oklahoma's redistricting process by, *inter alia*, vesting the power to draw maps in an independent redistricting commission. The lengthy process for selecting Commissioners is set forth in detail in the Petition. In brief, the Chief Justice selects a group of three retired judges or justices, called the "Panel," to consider applications for Commissioner. The Panel sorts the applicants into three Pools based on political affiliation, and selects 20 applicants from each Pool using set criteria. The Panel then chooses, by lot, two Commissioners from each Pool. These initial six Commissioners, by two-thirds majority, then select one more Commissioner from each Pool, giving due consideration to diversity of the Commission. *See* IP420, § 4(B)(4)(a)-(i).

The "Definitions" section of IP420 makes clear that, when the Petition uses the term "Panel," it "shall refer to the group of retired Judges or Justices chosen by the Chief Justice of the Oklahoma Supreme Court to oversee the creation of the Commission." *Id.* § 4(A)(7). Section 4(B)(4), entitled "Application and Selection of Commissioners," specifies *how* the Chief Justice is to choose this group of retired judges:

No later than December 15 of 2020, and no later than December 1 of each subsequent year ending in zero, the Chief Justice of the Oklahoma Supreme Court shall designate a Panel to review the applications. The Panel shall consist of three Judges or Justices who have retired from the Oklahoma Supreme Court or the Oklahoma Court of Criminal Appeals or the Oklahoma Court of Civil Appeals, and who are able and willing to serve on the Panel, selected by random drawing. If fewer than three state appellate Judges or Justices who are able and willing to serve have been identified, then the Chief Justice shall appoint a retired Oklahoma Federal District Court Judge who accepts such appointment.

IP420, § 4(B)(4)(b).

Opponents urge in their Reply brief, for the first time,¹ that § 4(A)(7) and § 4(B)(4)(b) are “self-contradictory,” and that this purported inconsistency in the *Petition* somehow renders the *gist* defective. They are incorrect, both as to their reading of the *Petition* and as to the requirements of the *gist*.

Initially, Opponents’ argument hinges entirely on the notion that the word “chosen” is wholly incompatible with the concept of “random drawing.” Not so. A random drawing is simply the *mechanism* the Chief Justice must use when choosing among retired Oklahoma appellate court judges or justices, if there are more than three able and willing to serve on the Panel. Indeed, the *Petition* elsewhere uses the common phrase “choose by lot”—indicating the drafters saw nothing mutually exclusive about the term “choosing” and random selection. *See* IP420, § 4(B)(4)(g) (requiring the Panel to “choose by lot, in random drawing, six (6) applicants to serve on the Commission...”); *id.* § 4(B)(4)(h) (similarly requiring the panel to “choose by lot one (1) Commissioner from each Pool to serve as Alternates”). Opponents offer no authority whatsoever for their assertion of contradiction. There is thus no ambiguity. Even if there were, moreover, and a dispute regarding the manner of Panel selection actually arose, it would simply present a question of interpretation for the Court—much like any other question of constitutional interpretation.

Opponents submit clarity regarding the Court’s role here is “critical” because, particularly since the adoption of Okla. Const. Art. VII-B via SQ447, the Court “is structured

¹ Opponents suggest this new argument in reply is proper because of Proponents’ Response briefs, which note that, under IP420, the Chief Justice (as opposed to, *e.g.*, the partisan Governor) “designates” or “select[s]” the three retired judges to serve on the Panel. Reply at 1. Of course, this is precisely the same language used in the *Petition* itself. *Cf., e.g., Cox Okla. Telecom, LLC, v. State ex rel. Okla. Corp. Comm’n*, 2007 OK 55, ¶ 33, 164 P.3d 150 (“New arguments may not be raised for the first time in a reply brief.”).

to be apolitical.” Reply at 2.² Somewhat ironically, the “apolitical” reform they tout, SQ447, created the independent Judicial Nominating Commission. Yet, though Opponents contend that all details related to who selects the Commissioners are “key elements” that must be communicated to voters, Reply at 2, neither the Legislature that drafted SQ447 nor the Attorney General who wrote its ballot title thought so—even the *ballot title* for SQ447 noted simply that it would “establish the Judicial Nominating Commission” and provide for “selection of members, and fixing members’ qualifications, tenure, powers and duties.”³

Further, the Court is involved in questions of a highly political nature (including redistricting⁴) all the time. Its Chief Justice also selects members of other bodies with inherently political roles (*e.g.*, the Pardon and Parole Board and the Ethics Commission)—even without the insulation of required randomization. Continuing to involve the Court in redistricting matters does not fundamentally change the “apolitical” structure—or nature—of the Court such that it must be specifically discussed in the gist. *See Resp.* at 4-7.

In any event, Opponents still cannot explain why setting out all the minute details of the selection process, even if it were somehow *possible*, is also uniquely necessary, such that the decision not to do so in the gist injects “fraud” in the initiative process. This Court has approved similar gists that simply put signatories on notice that the initiative would, *e.g.*,

² This is, of course, why Proponents determined it was better to have the Chief Justice appoint a Special Master and conduct the required Panel selection process than for overtly partisan officials to do so. But even courts cannot be *entirely* “apolitical”: for example, members of this Court are nominated by the Governor and subject to retention election.

³ *See* <https://www.sos.ok.gov/documents/questions/447.pdf>, at 8-9. This, despite the fact that, under Art. VII-B, six Commissioners are selected directly by the Oklahoma Bar Association. *See* Art. VII-B, § 3(a)(2). In addition, political party balance is required, and Commissioners may not, *inter alia*, hold other office or “any official position in a political party” during their 6-year term, or be nominated to judicial office for 5 years thereafter. *Id.* § 3(f).

⁴ For example, as noted in Proponents’ Response in the companion case, this Court selected the 2001 Congressional district map. *See Alexander v. Taylor*, 2002 OK 59, 51 P.3d 1204.

“define procedures” related to tax increases, without *detailing* those procedures. *In re Init.*
Pet. 362, 1995 OK 77, ¶ 10 & n.8, 899 P.2d 1145. This case is no different.

Respectfully submitted,



D. KENT MEYERS, OBA #6168
ALISON M. HOWARD, OBA #19835
MELANIE WILSON RUGHANI, OBA #30421
CROWE & DUNLEVY
A Professional Corporation
Braniff Building
324 North Robinson Avenue, Suite 100
Oklahoma City, Oklahoma 73102
(405) 235-7700
(405) 239-6651 (Facsimile)
kent.meyers@crowedunlevy.com
alison.howard@crowedunlevy.com
melanie.rughani@crowedunlevy.com

**ATTORNEYS FOR RESPONDENTS/
PROponents**

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was served this 8th day of January, 2020, as follows, to:

Via E-Mail and U.S. Mail

Robert G. McCampbell
Travis V. Jett
GableGotwals
One Leadership Square, 15th Floor
211 North Robinson Avenue
Oklahoma City, Oklahoma 73102

Via U.S. Mail

Office of the Oklahoma Attorney General
313 NE 21st St
Oklahoma City, Oklahoma 73105

Via U.S. Mail

Secretary of State's Office
State of Oklahoma
2300 N. Lincoln Blvd., Suite 101
Oklahoma City, Oklahoma 73105

